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Federal Communications Commission
Office of the Secretary

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Federal-State Joint Board on Universal Service
Docket No. _

) WC Docket No.
) 08-71

)
Ballard Rural Telephone Cooperative Corporation, Inc. (SAC #260396))
Petition for Waiver of Section 54.904(d) Filing Deadline)
For Submission of Annual Interstate Common Line Support)
Certification for a Rural Rate-of-Return Carrier)

**PETITION FOR WAIVER OF SECTION 54.904(d) DEADLINE
FOR ANNUAL INTERSTATE COMMON LINE SUPPORT CERTIFICATION**

Ballard Rural Telephone Cooperative Corporation, Inc. ("BRTC"; Study Area Code 260396), by its attorney, and pursuant to Section 1.3 of the Commission's Rules, requests waiver of the June 30, 2008 deadline established by Section 54.904(d) of the Commission's Rules for the filing of its annual certification with the Universal Service Administrative Company ("USAC"), and states that its Interstate Common Line Support ("ICLS") for the period from June 30, 2008 through June 30, 2009 will be used only for the intended purposes.

BRTC simultaneously transmitted its annual ICLS certifications by express overnight delivery service, to both of the required filing destinations: (1) the Commission's Office of the Secretary; and (2) USAC's Washington, DC office. The copy of the ICLS certification delivered to the Washington Office of the USAC was

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received on July 1, 2008.¹ The copy sent by overnight delivery service to the Commission's Office does not appear to have been received until Wednesday, July 2, 2008. June 30 in the current year fell on Monday; and no means of delivery was available on Saturday, June 28, or Sunday, June 29. The requested waiver is needed because what appears to be an inadvertent delay in delivery of the certifications by BRTC threatens the receipt of approximately \$291,000 of critically needed ICLS to which it is otherwise entitled during the period from June 30, 2008 to December 31, 2008.

BRTC's request for waiver is supported by good cause and is made in good faith. First, BRTC made material and substantial attempts to comply with all of its ICLS filing requirements for 2008-2009, including its ICLS projection and line count data filings. Second, BRTC timely prepared its annual ICLS certifications by the June 30, 2008 deadline and made a good faith effort to submit them by placing them for express delivery on that date.² No delivery services were available on the two calendar days prior to the Commission's deadline. USAC's copy of the carrier certifications were delivered the next business day, July 1, 2008. The Commission's copy of the certifications was placed for guaranteed overnight delivery to the

¹ BRTC's delivery to USAC was placed with the overnight express delivery service before the close of business on Monday, June 30, 2008.

² BRTC gratefully acknowledges that a USAC representative contacted BRTC by telephone on the evening of June 30, 2008, leaving a message on BRTC's automated voice mail system to advise that the certifications could be filed by facsimile to USAC on June 30. Unfortunately, the telephone call came after BRTC was closed for business and its personnel were unavailable. The voice mail message was retrieved on July 1, and after a call to USAC to confirm the message, a copy of BRTC's ICLS filings were immediately transmitted by fax in accordance with that request. BRTC would have faxed the certifications on June 30, if it had been aware that fax delivery was permissible. Delivery of the original USAC copy of the ICLS filings was completed on that same morning at 10:09 a.m. See FedEx Tracking Receipt attached as Exhibit 1.

Commission on the same date, but delivery was not completed with the Commission until July 2, 2008. Third, grant of the requested waiver will have no significant adverse impact upon USAC's administration of the ICLS program. Fourth, the loss or substantially delayed receipt of approximately \$291,000 of ICLS will impair the ability of BRTC to invest in new and upgraded telecommunications infrastructure, and may ultimately result in service quality decreases or local service rate increases for its rural Western Kentucky customers. Fifth, the loss of approximately \$291,000 of ICLS would constitute an excessive penalty for BRTC and its customers for what was an unintentional and inadvertent delay in delivery.

I.

Background

BRTC is a Kentucky rural incumbent local exchange carrier ("ILEC") whose primary operations are based in La Center, Kentucky (mailing address: P.O. Box 209, La Center, KY 42056). It serves approximately 5,759 access lines in a rural populated 348 square mile portion of Western Kentucky in the counties of Ballard and western McCracken, Kentucky. BRTC's service area encompasses the following seven (7) rural exchanges in a very low-density population region of Western Kentucky: (1) Kevil, which serves approximately 1,413 access lines in a 64 square mile area; (2) Heath, which serves approximately 965 access lines in a 36 square mile area; (3) La Center, which serves approximately 985 access lines in a 33 square mile area; (4) Bandana, which serves approximately 415 access lines in a 65 square mile area; (5) Barlow, which serves approximately 584 access lines in a 58 square mile area; (6) Wickliffe, which serves approximately 959 access lines in a 43 square mile area; and (7) Gage, which serves approximately 438 access lines in a 49 square mile area. These seven exchanges constitute the entire local exchange service area of BRTC, as well as its entire Kentucky study area (Study Area No. 260396).

BRTC is a rural telephone company, an ILEC, and a Rate of Return carrier that operates on an average schedule basis. It has been an eligible telecommunication carrier ("ETC") since the Telecommunications Act of 1996 was first implemented.

II.

Good Cause Exists for Waiver of the Section 54.904(d) Deadline

Section 1.3 of the Rules permits the Commission's rules to be waived for good cause shown. The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest.

Northeast Cellular Telephone Co. v. FCC, 897 F.2d 1164, 1166 (D.C. Cir. 1990). In addition, the Commission may take into account considerations of hardship, equity, and the effective implementation of public policy on an individual basis. *WAIT Radio v. FCC*, 488 F.2d, 1153, 1159 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972).

A. Material and Substantial Compliance Efforts

The special circumstances supporting grant of the requested waiver begin with the material, substantial and timely efforts made by BRTC to comply with all of the requirements and filings necessary to qualify for and receive ICLS for the 2008-2009 period.

BRTC, either directly or through the National Exchange Carrier Association ("NECA") as its representative, has complied fully and in a timely manner with ICLS data filing requirements of Section 54.903 (a) of the Commission's Rules (including the submission of projected common line cost and revenue data, actual common line cost and revenue data, and line counts) since these requirements became effective in late 2001. BRTC has not missed any of these Section 54.903(a) filing deadlines, and is current with respect to all of its ICLS data submission obligations.

BRTC also made a material, substantial, timely and good faith effort to comply with the subject June 30, 2008 ICLS certification deadline, and placed its certifications in the possession of a reliable and reputable overnight carrier with "guaranteed" delivery directions on the first day after such service was closed on the weekend prior to the deadline. Its General Manager signed the certifications on Monday June 30, 2008. Copies of the certifications were placed with Federal Express delivery, with directions for delivery priority overnight, both to the Commission and to USAC's Washington, DC office on Monday, June 30, 2008. Overnight guaranteed delivery has been more than sufficient during recent years to ensure delivery of filings from Western Kentucky to Washington, DC, and was in fact sufficient with respect to the ICLS certification mailed by BRTC to USAC; and the receipt of the delivery service demonstrates BRTC's good faith effort to place the certifications for delivery on or before the compliance date.

In sum, since ICLS was added to the Universal Service Fund ("USF") programs, BRTC has made substantial, material, timely and good faith efforts to comply with the ICLS filing requirements and procedures of the Commission and USAC.

B. Inadvertent Delivery Delay

The Commission has frequently waived deadlines that were missed due to unforeseen or inadvertent conditions. It has found that policy and equitable considerations, as well as the avoidance of undue hardship, warrant the grant of waivers to allow the acceptance and consideration of late filings in such

circumstances. See, for example, *Farmers Mutual Telephone Company*, DA 08-925 (Wireline Comp. Bur. April 21, 2008) (annual Section 54.314(d) state certification filing deadline waived to allow Local Switching Support ("LSS") recipient to receive support when confusion between it and the Idaho Public Utility Commission regarding new state ETC requirements resulted in a late-filed certification); *Alliance Communications Cooperative, Inc. and Hills Telephone Company, Inc.*, DA 05-3024 (Wireline Comp. Bur. November 22, 2005) (Section 54.301(b) LSS deadline waived to accept projected LSS data submission filed *four months* late due to disruptions caused by corporate reorganizations and employee reassignments); *Smithville telephone Company*, 19 FCC Red 8891 (Wireline comp. Bur. May 18, 2004) (Section 54.301(b) LSS deadline waived to accept a projected LSS data submission filed *four months* late due to disruptions caused by the death of the carrier's president and the illness of its regulatory accountant); *Metricom, Inc. Request for Waiver of Section 27.208(A) of the Commission's Rules*, 13 FCC Red 890 (Wireless Tel. Bur. 1998) (waiver of payment deadline when bank error in transmitting payment caused delay); *Application of Fred Farley for Authority to Construct and Operate a Domestic Public Cellular radio Telecommunications Service*, 4FCC Red 4670 (Comm. Carr. Bur. 1989) (waiver of deadline because clerical error caused improper filing on due date).

Here, BRTC delivered its ICLS certifications to Federal Express for priority overnight delivery both to the Commission and to USAC at the same time; but due to the weekend preceding the deadline, in which delivery service is not available,

BRTC was not able to complete delivery by June 30. Equity demands that BRTC's substantial compliance efforts, when considered in light of its perfect record of prior compliance, be recognized and that the Section 54.904(d) deadline be waived in order to avoid the imposition of undue hardship for a wholly unintended delay in the delivery of BRTC's certification to USAC.

C. No Adverse Impact on USF Administration

USAC has received BRTC's relevant projected common line cost and revenue data and line counts in timely fashion for it to incorporate BRTC's estimated ICLS funding into its USF contribution and disbursement plans and programs for 2008 and 2009. The relatively brief delay from June 30 to July 2 in the Commission's receipt of BRTC's ICLS certification will not disrupt or delay USAC's administration of the ICLS program or other federal USF programs. Hence, grant of BRTC's requested waiver will not adversely impact administration of the USF programs.

D. Adverse Impacts upon Investment, Local Rates and Jobs

In contrast, the loss of all or a significant portion of the approximately \$291,000 of ICLS to which BRTC would otherwise be entitled for the second half of 2008 period would be a very disruptive and potentially devastating to BRTC and its rural Western Kentucky customers. That amount represents approximately 8 percent of BRTC's total operating revenues.

Revenue losses of this magnitude are extremely onerous and disruptive for small companies like BRTC, particularly when they are not accompanied by any

offsetting loop or other cost reductions. BRTC will have no choice but to reduce its cash outlays, or increase its revenues from other sources, in particular its rural customers who depend on its services, in order to offset such a substantial ICLS loss.

One such source of revenue is an increase the local service rates paid by BRTC's rural customer-members. The projected \$291,000 if ICLS funds are not available by reason of the unintended technical infraction. This sum represents an average of \$50.53 for each of BRTC's approximately 5,759 access lines. Rate increases to recover cash amounts constitute an unwarranted penalty to BRTC's customers for an inadvertent delay, and do not advance the fundamental Universal Service principle of just, reasonable and affordable rates to the very people who would bear the cost of this inadvertent error.

In the alternative, the loss of approximately \$291,000 of ICLS revenues will impair the ability of BRTC to invest in infrastructure additions and upgrades, thereby reducing the future services and service quality available to its rural member-customers. In addition to eliminating \$291,000 in potential cash reserves available for equipment purchases and down payments, the potential ICLS revenue loss will make it more difficult for BRTC to obtain infrastructure investment loans at reasonable interest rates by reducing the assets and financial ratios used by bankers to evaluate and price such loans.

Yet another alternative for offsetting a loss of \$291,000 of ICLS is to reduce operating expenses. Whereas rural telephone companies take very seriously their

responsibilities as significant employers in rural communities, it may not be possible for a small company like BRTC to weather an \$291,000 revenue loss without cutting jobs or salaries. In the very small rural communities in BRTC's service area, the loss or temporary lay-off of even a couple of telephone cooperative jobs can cause significant disruptions and hardships.

E. Excessive and Onerous Penalty

Penalties and forfeitures are not favored by the law, and should be enforced only when they are within both the spirit and letter of the law. *United States v. One Ford Coach*, 307 U.S. 219, 226 (1939). In determining whether penalties and fines are excessive, courts have examined whether they are "so disproportionate to the offense as to shock public sentiment" or "contrary to the judgment of reasonable people concerning what is proper under the circumstances." *Hindt v. State*, 421 A.2d 1325, 1333 (Del. 1980).

The imposition of an effective penalty of approximately \$291,000 upon BRTC for an inadvertent error would be wholly disproportionate to the alleged infraction and "excessive" in the standards of equity normally applied to such matter. By contrast, Section 503(b)(2)(B) of the Act imposes a much smaller maximum penalty of \$100,000.00 upon a common carrier for a *willful* violation of a law or regulation.

III.

Conclusion

Fore the foregoing reasons, and for good cause shown, the Commission is respectfully requested to waive the Section 54.904(d) ICLS certification deadline,

and to order USAC to distribute to BRTC all of the \$582,000 of ICLS to which BRTC is entitled for the 2008-2009 period (including the \$291,000 of ICLS to which BRTC is otherwise entitled during the second half of 2008).

Because the ICLS at stake is so substantial and critical for BRTC, the Commission is requested to act expeditiously upon this petition.

Respectfully submitted,

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DECLARATION

I, Harlon E. Parker, hereby declare, under penalty of perjury, as follows:

1. I am the General Manager of Ballard Rural Telephone Cooperative Corporation, Inc. (BRTC).

2. I have reviewed BRTC's "Petition for Waiver of Section 54.904(d) Deadline for Annual Interstate Common Line Support Certification," dated August 4, 2008, and declare that the factual statements and representations therein are true and correct to the best of my knowledge, information and belief.

Signature

Date

I certify that a copy was mailed this _____ day of August, 2008, to:

Matthew Berry, Esq.
General Counsel
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Mark S. Medlin